No. 90-994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEWIS & COMPANY, LAWYERS, L. BURKE LEWIS, AMY J. CASSEDY,
Petitioners,
vs.
KONSTANTIN THOEREN, PATROLA FILMS, INC., PATROLA, G.m.b.H., ADRIANA INTERNATIONAL CORPORATION, HANS ALBERT-KUNZ, KEMAL ZEINAL-ZADE, ANTHONY M. MIDGEN, ARIAN FILMS PRODUCTIONS, LTD., ARTHUR L. MARTIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL K. ZWEIG
Counsel of Record
SACKS & ZWEIG
Suite 1300
100 Wilshire Boulevard
Santa Monica, California 90401
(213) 451-3113

Of Counsel:
BRUCE IAN FAVISH
528 Colorado Avenue
Santa Monica, California 90401
(213) 394-5995

Attorneys for Respondents
KONSTANTIN THOEREN, PATROLA FILMS, INC.,
and PATROLA, G.m.b.H.

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

75 pp

No. 90-994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEWIS & COMPANY, LAWYERS, L. BURKE LEWIS, AMY J. CASSEDY,
Petitioners,
vs.
KONSTANTIN THOEREN, PATROLA FILMS, INC., PATROLA, G.m.b.H., ADRIANA INTERNATIONAL CORPORATION, HANS ALBERT-KUNZ, KEMAL ZEINAL-ZADE, ANTHONY M. MIDGEN, ARIAN FILMS PRODUCTIONS, LTD., ARTHUR L. MARTIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL K. ZWEIG
Counsel of Record
SACKS & ZWEIG
Suite 1300
100 Wilshire Boulevard
Santa Monica, California 90401
(213) 451-3113

Of Counsel:
BRUCE IAN FAVISH
528 Colorado Avenue
Santa Monica, California 90401
(213) 394-5995

Attorneys for Respondents
KONSTANTIN THOEREN, PATROLA FILMS, INC.,
and PATROLA, G.m.b.H.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

California Cases

Statutes

Rules

I. DEFECTS IN QUESTIONS PRESENTED BY LEWIS.[1]

---

[1]As used herein: "Lewis" or "Lewis parties" refers collectively to Lewis & Company, Lawyers, L. Burke Lewis and Amy J. Cassedy; "Adriana" refers collectively to Adriana International, Inc., Arian Films Productions, Ltd., Kemal-Zeinal Zade, Hans-Albert Kunz and Anthony M. Midgen; "Thoeren" refers collectively to Konstantin Thoeren, Patrola Films, Inc., and Patrola, G.m.b.H; "Greenberg Glusker" refers to Greenberg, Glusker, Fields, Claiman & Machtinger, the law firm which replaced Lewis as counsel of record for Adriana; "Ninth Circuit" refers to the United States Court of Appeals for the Ninth Circuit; "District Court" refers to the United States District Court for the Central District of California; "Judge Real" refers to the Honorable Manuel L. Real, Chief Judge of the Central District; "Special Master", "Special Master Carroll", or "Mr. Carroll" refers to John Francis Carroll, special master appointed by Judge Real in the District Court action; "Petition" refers to Lewis' Petition for Writ of Certiorari; "Lewis App." refers to the Appendix submitted by Lewis in conjunction with the Petition; "Thoeren App." refers to the Appendix submitted herewith containing Thoeren's Ninth Circuit opening brief; and "Opinion" refers to the written opinion of the Ninth Circuit in this action, reprinted as Lewis App. I (Opinion references are to page numbers of Lewis App. I).

In view of Lewis' extraordinary "Questions Presented" (Petition, pp. i-ii), and in light of the directives of Sup. Ct. R. 15.1[2] and 24.2, Thoeren's counsel are compelled to comment on the propriety of Questions 1, 2 and 6 of Lewis' Questions Presented.

Sup. Ct. R. 14.1(a) provides that questions presented for review "should be short and concise and should not be argumentative or repetitious." Sup. Ct.

---

[2]Rule 15.1 provides in pertinent part (emphasis in original):

> . . . the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. . . . Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later.

R. 14.5 adds: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."

Lewis' Questions Presented are neither short, nor concise, nor accurate, nor clear. Instead they are argumentative, repetitious, and replete with explicit and implicit misstatements.

A. First Question Presented.

Lewis' first Question addressing the appointment and conduct of Special Master Carroll is deficient in the following respects:

1. As discussed in sections which follow, the only issues Lewis has standing to raise in this proceeding

relate to the propriety of the sanctions and contempt orders imposed against Lewis by the District Court and the Ninth Circuit,[3] the propriety of the Ninth Circuit granting Adriana's motion to substitute in new counsel in place of Lewis, and the denial of Lewis' petition for rehearing and suggestion for rehearing en banc. None of these actions relates to the Special Master. Despite twice being ordered by the Ninth Circuit to limit any reply briefs to issues relevant to Lewis' appeal (Lewis

---

[3]In the course of the District Court proceedings, the Lewis parties were the objects of various sanctions and contempt orders. After final judgment, the Lewis parties appealed the sanctions and contempt on their own behalves, separate from the appeal filed on behalf of Adriana. The Adriana parties, the only parties arguably aggrieved by the Special Master's appointment, and therefore the only parties with standing to raise the issue on appeal, have not filed a petition for writ of certiorari.

App. XII and XIV), despite Greenberg Glusker's abandonment on appeal of Adriana's objection to the Special Master (Opinion, p. 2 n. 1), and despite a specific finding by the Ninth Circuit that as to Adriana objections to the Special Master were waived, and as to Lewis they were irrelevant (Opinion, p. 32 n. 11), Lewis persists in making relentless, far-fetched objections to Special Master Carroll. It is misleading and inaccurate of Lewis to suggest to this Court that he has standing to challenge the appointment of Special Master Carroll.

2. Lewis' statement that Judge Real "deputize[d]" Special Master Carroll is inaccurate.[4]

---

[4]Although Lewis seeks to have this Court review the District Court's reference to Special Master Carroll, the March 18, 1987 written order appointing

3. Lewis' statement that Mr. Carroll is Judge Real's "long-time friend" is a baseless and misleading attempt to insinuate collusion between Judge Real and Mr. Carroll. Despite myriad similar innuendos by Lewis throughout the proceedings below, and in the instant Petition, Lewis has never offered a shred of evidence to support his ad hominem accusations (Opinion, pp. 33-34).

4. Lewis' statement that Mr. Carroll was appointed to serve as "a surrogate judicial officer" is inaccurate, misleading and argumentative.

5. Lewis' contention that

Mr. Carroll as master is not included in Lewis' Appendix, as required by Sup. Ct. R. 14.1(k)(ii). Accordingly, Lewis' First Question is not properly presented.

litigants were ordered to pay Special Master fees on pain of contempt "at the annual rate of $750,000",[5] is misleading, irrelevant, argumentative, and not substantiated by the record. See section VI.B.3. infra.

B. Second Question Presented.

Lewis' Second Question regarding alleged "false testimony, sham issues, and sham pleadings" is simply unintelligible. It is also irrelevant, inaccurate and completely unsupported by the record. While Lewis' Second Question fails to articulate any justiciable issue, a careful reading of pp. 42-47 of the Petition suggests that he contends the Ninth Circuit erred in

---

[5]The Lewis parties did not raise Mr. Carroll's compensation as an issue in their Ninth Circuit opening briefs; consequently, it was not properly before that Court.

granting Adriana's motion to substitute new counsel in place of Lewis.[6]

The proposition apparently advanced by Lewis -- that the Ninth Circuit erred by granting Adriana's request to retain new counsel and refusing to mandate the continued employment of Lewis -- is unabashed lunacy. See section VI.F. infra.

C. Sixth Question Presented.

Lewis' Sixth Question presented attempts to ask whether attorneys should have a right of immediate interlocutory appeal of sanctions awards. This question is improper as (1) Lewis never sought direct interlocutory appeal of the sanctions awards and so lacks standing, and (2) Lewis did not raise

---

[6]Lewis' protracted opposition to this motion, detailed in the chronology in section IV.C., infra., is nothing short of unbelievable.

this issue in the Ninth Circuit opening briefs.

II. RESPONSE TO LEWIS' "LIST OF PARTIES".

Sup. Ct. R. 14.1.(b) requires a petition for writ or certiorari to include "a list of all parties to the proceeding in the court whose judgment is sought to be reviewed."

In the caption and at p. iii of the Petition, Lewis includes "Arthur L. Martin" as a party. This inclusion is inexplicable as Arthur Martin -- an attorney who at one point worked for Lewis -- was not a party to the proceedings below and is not named in the judgment sought to be reviewed.

For clarification, Adriana International, Inc. was Plaintiff and Counter-Defendant in the District Court, Appellant in the Ninth Circuit, and is a

Respondent herein. Arian Films Productions, Ltd., Kemal-Zeinal Zade, Hans-Albert Kunz, and Anthony M. Midgen were Third-Party Defendants in the District Court, Appellants in the Ninth Circuit, and are Respondents herein. Konstantin Thoeren, Patrola Films, Inc., and Patrola, G.m.b.H. were Defendants and Counter- and Cross-Complainants in the District Court, Appellees in the Ninth Circuit, and are Respondents herein.

III. RESPONSE TO LEWIS' "STATEMENT OF THE CASE".[7]

Language from Thoeren's Ninth

---

[7]Sup. Ct. R. 14.1(g) requires a petition to contain a "concise statement of the case containing the facts material to the consideration of the questions presented." Sup. Ct. R. 24.2 provides that in a respondent's brief "no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement of the other side."

Circuit brief is fitting in response to Lewis' phantasmic Statement of the Case:

> Reading Appellants' four briefs, spanning in excess of 130 pages, is akin to a walk with Alice through the Looking Glass. The reader, for proper perspective, must constantly recognize the absence of reality and the wholesale employment of distortion. Nothing is as Appellants would have this Court believe . . .

Thoeren App., p. 1.

It is impossible in view of space limitations, to address all of Lewis' inaccuracies and omissions. Counsel will endeavor, consistent with their obligations under Sup. Ct. R. 15 and 24, to correct the misconceptions perpetrated.[8]

---

[8]Following is a sampling of Lewis' claims which either find no support in the record, are inaccurate, and/or are matters Lewis has no standing to raise: (a) "[C]areers and lives are at stake." (p. 4); (b) There is systemic "corruption in the largest Federal judicial district in the United States

and its Chief Judge [sic]" (p. 4); (c) The Ninth Circuit is engaged in a "cover up" of the alleged corruption. (p. 4); (d) The Ninth Circuit's opinion contains "75 misrepresentations of facts, basic law, and the record." (p. 4); (d) "Nowhere . . . does the Ninth Circuit's opinion specify the purported misconduct by petitioners[.]" (p. 5)(Such misconduct is detailed at pp. 30-37 of the Opinion.); (e) "[N]owhere was there even a motion in the district court which specified purported misconduct." (p. 5)(There were several.); (f) "The purpose of such intellectual dishonesty is to undermine petitioners' credibility in bringing to public attention the uncontested facts evidencing the corrupt practice in the Central District of California." (p. 5); (g) Judge Real "has for the last 13 years appointed his long-time friend, John Francis Carroll, outside the confines of the U.S. Constitution, statute, or federal rules, to serve as a surrogate judicial officer, exercising Judge Real's federal judicial authority[.]" (pp. 5-6); (h) "[L]itigants are made to pay Mr. Carroll's salary, on pain of contempt, at the annual rate of approximately $750,000, including compensation for Mr. Carroll's support staff and associate/daughter." (p. 6); (i) "Through this practice, approximately $10 million has changed hands, although neither Judge Real nor Mr. Carroll will formally disclose the extent of the practice[.]" (p. 6)(see section VI.B.3. infra.); (j) "[T]he FBI

IV. THOEREN'S STATEMENT OF THE CASE.

Thoeren offers the following chronology to apprise this Court of facts relevant to the only issues Lewis arguably has standing to raise, viz.: the Ninth Circuit's affirmance of sanctions and contempt orders against Lewis by the District Court; the Ninth Circuit's imposition of additional sanctions against Lewis in connection with the appeal; the Ninth Circuit's

---

has commenced an investigation at the request of a federal appellate judge to the very highest levels of that agency." (p. 6); (k) "[T]here already appears to have been one homicide resulting from attempts by lawyers to expose corruption in federal courthouses in California." (p. 7); (l) Lewis' "own physical safety has been put in jeopardy[.]" (p. 7); Lewis has suffered adverse rulings in unrelated proceedings due to the Ninth Circuit decision (pp. 7-8 n. 4); (m) Judge Real has "sold or bartered" his office "for benefit of friends, and other judges, who . . . are protecting such judge and his corrupt practice." (p. 8).

granting of Adriana's motion to substitute new counsel; and the Ninth Circuit's denial of Lewis' petition for rehearing and suggestion for rehearing en banc. Regarding the underlying dispute and Lewis' outrageous conduct before the District Court, see the Opinion (pp. 4-9, 12-17 and 30-37), the District Court's February 8, 1988 order (Lewis App. V), and Thoeren's Ninth Circuit brief (Thoeren App., pp. 18-45).

A. Lewis' Obstreperous Conduct and Sanctions in the District Court.

March 16, 1987: Lewis sanctioned $4,955.00 for frivolous motion to disqualify Thoeren's counsel, "payable forthwith" (Lewis App. II).

March 24, 1987: Lewis sanctioned $990.00 for failure to comply with Local Rule 6, "payable forthwith" (Lewis App. III).

May 19, 1987: Lewis ordered in contempt for failure to pay sanctions ordered on March 16 and March 24, and sanctioned an additional $2,520.00 (Lewis App. IV).

July 5, 1988: Lewis sanctioned $2,292.50 for bad faith filing of motion for reconsideration of amended order (Lewis App. IX).

February 8, 1988: Lewis sanctioned $6,440.00 for unnecessary court appearances and legal costs caused by frivolous and dilatory tactics (Lewis App. V).

District Court monetary sanctions against Lewis totaled $17,197.50.

B. Failed Interlocutory Appeals.

April 9, 1987: The Adriana parties, not Lewis, appeal the March 16 and March 24, 1987 sanctions awards. (Ninth Circuit docket no. 87-5817).

June 12, 1987: The Adriana parties, not

Lewis, appeal the May 19, 1987 contempt and sanctions (Ninth Circuit docket no. 87-6060; consolidated with appeal no. 87-5817 by Ninth Circuit).

December 21, 1987: Ninth Circuit dismisses Adriana appeals for lack of jurisdiction as interlocutory in nature.

C. Lewis' Obstreperous Conduct and Sanctions on Appeal.

May 15, 1989: Lewis serves motion for leave to file opening brief in excess of 50 pages (100 pages sought) and for 30-day extension of time beyond original due date of May 23, 1989.

May 22, 1989: Ninth Circuit grants Lewis extension of time to June 22, 1989, but denies permission to file brief in excess of 50 pages. Order states: "Absent extraordinary circumstances, no further extension of time to file this brief will be

granted."

May 24, 1989: Lewis serves motion for reconsideration of May 22 order, requests permission to file a single consolidated brief of up to 125 pages (25 pages more than original request) and seeks an additional extension. Lewis threatens: "In the event this court denies such relief, appellants will file a separate brief for each appellant, incorporating by reference arguments among such separate briefs."

June 7, 1989: Ninth Circuit grants Lewis permission to file an opening consolidated brief not to exceed 60 pages, but denies time extension.

June 15, 1989: Lewis serves motion for reconsideration of June 7 order, again requests permission to file a 125-page brief, and seeks yet another time extension. Lewis again threatens: "In

the event such relief is not granted, appellants will file separate briefs pursuant to Fed. R. App. P. 28(i)."

June 22, 1989: Due date for Lewis' opening brief comes and goes.

June 22, 1989: Lewis serves request for modification of June 7 order, seeking extension of time to file brief until 10 days after the Ninth Circuit rules on Lewis' June 15 motion for reconsideration.

July 7, 1989: Ninth Circuit denies Lewis' June 15 motion for reconsideration and states: "Appellants may elect to submit a single oversize brief of not more than 60 pages on behalf of all appellants." Ninth Circuit grants Lewis another extension to July 20, 1989 to file opening brief.

July 25, 1989: Thoeren's counsel receives four separate opening briefs

from Lewis' office, totaling 131 pages. Each brief incorporates and cross-references substantial portions of the others. The density of the briefs is compounded by 1-1/2 line spacing, rather than double-spacing as required by Fed. R. App. P. 32(a). The briefs are prolix, confusing, full of irrelevant and erroneous representations of law and fact, and lack intelligible, relevant legal analysis.

September 29, 1989: Thoeren files a single opening brief (Thoeren App.). The brief requests attorneys' fees and costs under Fed. R. App. P. 38.

October 3, 1989: Greenberg Glusker serves motion to substitute as new counsel of record for Adriana in place of Lewis. The motion recites that Lewis, in violation of California law and ethical canons, refused to effect

the substitution of new counsel or release client files.

October 10, 1989: Lewis serves 35-page response to Greenberg Glusker's motion, inter alia, challenging Adriana's right to change counsel, claiming that the substitution is for the improper purpose of having the Court rely on allegedly false testimony and documents proffered by Adriana, and requesting an order that Lewis be retained as Adriana's counsel.

October 11, 1989: Greenberg Glusker submits reply memorandum stating inter alia (at p. 1):

> In opposition to the motion, Lewis has filed a brief that defies description. It is, quite literally, incredible.
>
> Lewis' opposition is replete with unfounded, untrue and irrelevant assertions and scurrilous attacks on Lewis' former clients and their new attorneys.

Michael Collins, of Greenberg

Glusker, submits supporting declaration stating:

> I have reviewed the opening briefs filed on behalf of appellants, and I have reviewed the appellees' brief that was recently filed. Based thereon, I have reached the tentative conclusion (subject to further research and review of the record) that certain arguments made on behalf of appellants in the opening briefs are without merit or so tangential as to be irrelevant. I expect that the reply briefs will abandon and withdraw certain of those arguments . . . .

October 17, 1990: Lewis serves 10-page supplemental opposition in response to Greenberg Glusker's reply memorandum.

November 9, 1989: Lewis serves a second supplemental opposition.

November 28, 1989: Greenberg Glusker serves a supplemental reply memorandum stating inter alia (at pp. 4, 5):

> The matters referred to in Lewis' opposition to the substitution motion concerning

> his view of the merits underlying the action are both untrue and completely irrelevant to a determination of this appeal.
>
> . . .
>
> The assertion (which was Lewis' creation) that Chief Judge Real was receiving some sort of monetary "kick-back" from the appointed special master is obnoxious and an affront to the Court, for which appellants humbly apologize.

December 6, 1989: Lewis serves 25-page response to Greenberg Glusker's supplemental reply memorandum. This is Lewis' fourth lengthy pleading in response to Greenberg Glusker's motion to substitute in as new counsel.

January 30, 1990: The Ninth Circuit grants Greenberg Glusker's motion to substitute as counsel for Adriana, and orders Lewis to transfer the case file within 7 days. The Court sets new dates for the reply briefs and orders that any reply brief from Lewis "shall brief those discrete issues involving Lewis &

Company" (Lewis App. XII; emphasis added).

February 6, 1990: Lewis serves motion for partial modification and/or stay of the Ninth Circuit's January 30 order pending reconsideration.

February 9, 1990: Lewis serves 30-page motion for reconsideration (with 40 pages of exhibits) of the January 30 order and requests a stay pending reconsideration.

February 13, 1990: Greenberg Glusker serves opposition to Lewis' motion for reconsideration stating inter alia (at p. 2):

> Lewis sees constitutional issues in every question. He accuses the Chief Judge of the District Court, the Special Master, his former clients and their successor counsel of fraud, corruption and collusion, all without a shred of evidence.

February 19, 1990: Lewis serves reply.

March 2, 1990: Lewis' motion for stay of transfer of case file to new counsel pending disposition of the motion for reconsideration is granted; the briefing schedule is vacated.

April 2, 1990: Ninth Circuit denies Lewis' motion for reconsideration. Lewis is ordered to deliver case file to new counsel within 7 days; briefing schedule is again revised. Ninth Circuit again directs Lewis to brief only "those discrete issues involving Lewis & Company," and mandates no further extensions of time (Lewis App. XIV).

April 6, 1990: Lewis serves motion for emergency stay of Ninth Circuit's April 2 order pending petition for rehearing and suggestion for hearing en banc.

April 9, 1990: Court denies motion for

stay and orders Lewis to comply with April 2 order by April 13, 1990.

April 16, 1990: Lewis serves 15-page petition for rehearing and suggestion for rehearing en banc of January 30, April 2, and April 9 orders.

April 30, 1990: Lewis serves 17-page emergency motion for expedited consideration of petition for rehearing and suggestion for rehearing en banc, or in the alternative for extension of time to file reply briefs.

May 2, 1990: Greenberg Glusker serves opposition to Lewis' emergency motion stating inter alia (at pp. 1, 4):

> Appellants file this opposition to dispel any inference that there is any truth whatsoever to the incredible accusations made in the emergency motion or the underlying papers and to suggest that this Court consider imposing appropriate sanctions upon Lewis for his conduct, including disbarment.

May 7, 1990: Greenberg Glusker serves

Adriana Reply Brief.

May 7, 1990: Lewis serves 15-page reply (not including copious declarations and exhibits) to Greenberg Glusker's opposition to Lewis' emergency motion.

May 8 or 9, 1990: Ninth Circuit denies Lewis' emergency motion for expedited consideration of the petition for rehearing, and affirms May 21, 1990 due date for Lewis' reply.

May 21, 1990: Nearly one year to the day after Lewis' original May 23, 1989 due date for opening briefs, Lewis serves two reply briefs, one of 20 pages (not including attachments) on behalf of Lewis & Company and Amy J. Cassedy, and one of 19 pages (not including extensive attachments) on behalf of L. Burke Lewis. By addressing the same irrelevant issues raised in the Petition herein, the briefs violate the Ninth

Circuit's January 30 and April 2, 1990 orders limiting Lewis' reply briefs to "discrete issues involving Lewis & Company."

June 7, 1990: The case is argued before the Ninth Circuit. The Panel allocates 30 minutes of argument to Thoeren, 30 minutes to Adriana and 5 minutes to Lewis. Lewis requests, and the Panel accedes to, 9 minutes of argument time.[9]

September 5, 1990: The Ninth Circuit orders sanctions against Lewis and Adriana for reasonable attorneys' fees and double costs, and sets briefing schedule on subject of fees and costs.

September 10, 1990: The Ninth Circuit

---

[9]Pursuant to Fed. R. App. P. 34, Ninth Circuit Local Rule 34-4, and Ninth Circuit Internal Operating Procedures II.G., the Panel has discretion to regulate oral argument time, and may deny argument altogether where an appeal is frivolous.

renders its decision (Lewis App. I), inter alia, affirming the sanctions and contempt orders against Lewis, and awarding additional attorneys' fees and double costs under Fed. R. App. P. 38 and 28 U.S.C. § 1927, on grounds that Lewis' opening briefs are frivolous and in violation of Fed. R. App. P. 32(a).

September 12, 1990: Thoeren submits brief requesting award of attorneys' fees and double costs.

September 20, 1990: Lewis serves motion for extension of time to respond to the Ninth Circuit's September 5, 1990 order.

September 24, 1990: Lewis serves a petition for rehearing and suggestion for rehearing en banc. Adriana serves a petition for rehearing.

October 5, 1990: Ninth Circuit denies Lewis' motion for extension of time to respond re fees and costs.

October 21, 1990: Lewis serves motion for clarification of the October 5, 1990 order.

November 16, 1990: Ninth Circuit denies Lewis' motion for clarification of October 5, 1990 order; denies Lewis' petition for rehearing on grounds of untimeliness; and assesses attorneys' fees and double costs against Adriana and Lewis.

V. SUMMARY OF ARGUMENT

Sup. Ct. R. 10 sets forth factors to be considered by this Court in deciding whether to grant certiorari. Only sections (a) and (c)[10] are even

---

[10] Sup. Ct. R. 10 states in part:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed

remotely applicable to Lewis' Petition. As detailed below, the arguments advanced by Lewis are irrelevant, unsubstantiated and offensive. Moreover, they fail to identify any legitimate constitutional issue, any conflict among Circuits, or any other important issue conceivably justifying certiorari.

VI. ARGUMENT

A. Limited Scope of Review.

Lewis improperly includes issues in

---

from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court, as to call for an exercise of this Court's power of supervision.
(b) [Not applicable.]
(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

the Petition which the Ninth Circuit rejected as untimely raised and/or irrelevant to the sanctions and contempt orders appealed by Lewis. This Court should employ the same limited focus.

The Ninth Circuit limited Appellants' opening brief to 60 pages (see June 7, 1989 entry of chronology, p. 17 infra.)[11]. Lewis filed four separate opening briefs on behalf of different Appellants, totalling 131 pages. Each brief incorporated sections of the other briefs.

Lewis' opening Ninth Circuit brief, which was 43 pages long, "joined" in the Arguments of the opening briefs of Adriana (39 pp.); Zade, Kunz and Midgen (43 pp.); and Arian Films Productions

---

[11]The Ninth Circuit's Order is omitted from Lewis' Appendix.

(5 pp.).[12] By including the "joined" portions of other briefs, the Lewis brief exceeded the allotted 60-page limit by 70 pages.[13]

The Ninth Circuit's January 30 and April 2, 1990 orders (Lewis App. XII and XIV) directed Lewis to limit any reply briefs to discrete issues relating to Lewis & Company, i.e., the sanctions and contempt orders. Nonetheless, Lewis raised numerous issues in the reply briefs not raised in the opening briefs and outside the ambit of the sanctions and contempt orders. Appropriately, the

---

[12] See copies of briefs in Lewis' Supplemental Appendix to Petition (lodged).

[13] Lewis employed a similar tactic with the reply briefs, "joining" a 20-page brief on behalf of Amy J. Cassedy and Lewis & Company, with a 19-page brief on behalf of L. Burke Lewis, resulting in 39 aggregate pages (Lewis' page limit was 20; see Lewis App. XI).

Ninth Circuit refused to consider the following arguments not included in Lewis' opening briefs[14] or outside the scope of the sanctions and contempt orders (see Opinion, p. 32 n. 11):

(a) Judge Real should have been disqualified because of alleged ex parte communications with the Special Master;

(b) the reference to the Special Master was unconstitutional;

(c) the default judgment was unwarranted;

(d) Kordich v. Marine Clerks Ass'n, 715 F.2d 1392 (9th Cir. 1983) should be overturned;

(e) new counsel's motion for substitution was improper;

(f) new counsel performed

---

[14] Miller v. Fairchild Industries, Inc., 797 F.2d 727, 738 (9th Cir. 1986) (issues raised for first time in reply brief will not be addressed).

improperly; and

(g) there was no personal jurisdiction over AFP.

Most of these arguments resurface in this Petition.[15]

This Court should not entertain on certiorari issues which the Ninth Circuit correctly declined.

In Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), this Court declined to address an issue raised in a petition for certiorari which the Court of Appeals did not address:

> A close reading of the opinion below, however, reveals that

---

[15]Advancing irrelevant arguments, where standing is lacking, justifies sanctions on appeal. See, e.g., Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc., 886 F.2d 1485, 1494 (7th Cir. 1989); Mone v. Comm'r, 774 F.2d 570, 574-575 (2nd Cir. 1985); Limerick v. Greenwald, 749 F.2d 97, 101-102 (1st Cir. 1984).

> the Court of Appeals did not address the question. This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. [Cites.] We see no reason to depart from this practice in the case at bar.

486 U.S. at 99 n. 5. Accord, Youakim v. Miller, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976); Cort v. Ash, 422 U.S. 66, 72 n. 6, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The Court should deviate from this general policy only in exceptional circumstances (Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927)), which certainly are not present in this case.

Based on the foregoing, this Court should refuse to consider Questions 1, 2, and 6 of Lewis' Questions Presented.

B. Purported Special Master Issues.

Lewis maintains that issues involving reference to, and conduct of, Special Master Carroll are "the crux of this case" (Petition, p. 4). In reality, there are no grounds under Sup. Ct. R. 10 to grant certiorari as to issues relating to the Special Master because: (a) Lewis lacks standing to raise such issues; (b) objections to the Special Master were waived; (c) certain issues were not raised by the Lewis parties in their Ninth Circuit briefs; (d) Lewis' contentions are unsupported by any evidence; and (e) the Lewis parties have not included a copy of the order of reference in their Appendix.

1. Lewis Lacks Standing.

Due to Lewis' obstreperous conduct as counsel for Adriana, numerous

sanctions and a contempt order were imposed on Lewis and Adriana jointly and severally. All of the sanctions were ordered by the District Court. None of the orders was made by the Special Master. Lewis appealed the sanctions and contempt orders to the Ninth Circuit, which affirmed and assessed additional attorneys' fees and double costs for the appeal against Lewis and Adriana.

At page 22 (note 13) of the Petition, Lewis claims, based on a distorted reading of Kordich v. Marine Clerks Ass'n, supra., 715 F.2d 1392, that he has standing to challenge the appointment of Special Master Carroll, apparently because Lewis' clients had such standing. Kordich addressed the question whether attorneys, who were sanctioned jointly and severally with

their clients, had a right of immediate interlocutory appeal of the sanctions because they were "non-parties", or were bound by the rule applicable to their clients, that the sanctions were not appealable prior to entry of a final judgment. The Court held that because of the congruence of interests between attorney and client in that case, there was "no reason to permit indirectly through the attorney's appeal what the client could not achieve directly on its own: immediate review of interlocutory orders imposing liability for fees and costs." 715 F.2d at 1393. The Court dismissed the interlocutory appeal and noted that the attorneys would be free to challenge the sanctions on appeal

after final judgment.[16]

The Lewis parties claim that Kordich gives them standing to challenge the reference to the Special Master, presumably based on a theory that their congruence with Adriana was so great as to transmit or create standing for Lewis as if Lewis were Adriana.[17]

---

[16]Presumably, if in Kordich the award of attorneys' fees and costs was made by a special master, the attorneys, on their own behalf, could challenge the master's authority on appeal after final judgment. But where, as here, since all the sanctions orders against Lewis were issued by the Court, the Lewis parties have no standing to complain of the Special Master's actions.

[17]Indicative of Lewis' chronic distortion of law and fact, at p. 17 of the Ninth Circuit Reply Brief of Amy J. Cassedy and Lewis & Company, the Lewis parties condemn that part of Kordich which they now invoke for standing:

> That the interests of lawyer and client are not synonymous, as required under Kordich [cite], is demonstrated every day in litigation, but never more clearly than here. . . . To assume concurrence of interest between

This is preposterous. Kordich does not hold or even suggest that upon final judgment, the attorneys alone could maintain an appeal of a judgment entered against their clients. This would be an absurd result and would fly in the face of basic principles of standing.

Only the parties aggrieved by the Special Master's orders, viz., Adriana et al., have standing to object to the master, and they have chosen not to seek

---

client and counsel and to give it the force of law is not only unfair but inherently and invidiously discriminatory and violative of fundamental notions of due process under the Fifth and Fourteenth Amendments of the U.S. Constitution.

Similarly, at pp. 61-63 of the Petition, Lewis urges this Court to overrule Kordich. Apparently, Lewis wants the interests of lawyer and client to be synonymous for purposes of standing to object to sanctions, but not synonymous regarding the right to an immediate interlocutory appeal.

review. It is well-established that only a party aggrieved by a final judgment may appeal from it, and that a party may only appeal to protect its own interests, not those of a coparty. Libby, McNeill, and Libby v. City National Bank, 592 F.2d 504, 515 (9th Cir. 1978); Goldstein v. Andreson & Co., 465 F.2d 972, 973 n. 1 (5th Cir. 1972); Webb v. Beverly Hills Fed. Savings & Loan Ass'n, 364 F.2d 146, 149 (9th Cir. 1966); Seaboard Sur. Co. v. United States, 306 F.2d 855, 859 (9th Cir. 1962); United States v. Adamant Co., 197 F.2d 1, 5 (9th Cir.), cert. denied, 344 U.S. 903, 73 S.Ct. 283, 97 L.Ed. 698 (1952).

Lewis' attempt to manufacture standing for the Special Master issues renders Lewis' Petition frivolous.

2. Waiver.

As stated, the Lewis parties have no standing to object to the appointment of Special Master Carroll since Mr. Carroll did not issue the orders from which Lewis appeals. Even if standing is presumed, there is no reason to disturb the Ninth Circuit's correct determination that any objections to the Special Master were waived:

> [A]n objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter or the party's objection is waived. [Cite.]
> . . .
> Adriana did not object to the appointment of the special master at the time of the appointment. Adriana attended numerous meetings, depositions and hearings with the special master regarding discovery throughout March, April, May and June of 1987. Adriana finally objected to the appointment of a special master on July 6, 1987. Because the objection was not

> filed within a "reasonable time" of the appointment, Adriana waived its objection to the special master's appointment.

Opinion, p. 10.

The record amply supports a finding of waiver under pertinent case law.[18]

---

[18]Objection to appointment of a special master is waived if not made at the time of, or within a reasonable time after, the appointment. Johnson Controls, Inc. v. Phoenix Control Systems, Inc., 886 F.2d 1173, 1176 (9th Cir. 1989); Spaulding v. University of Washington, 740 F.2d 686, 695 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984) overruled on other grounds, Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987).

Other circuits are in accord: Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1566-67 (D.C. Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 228, 102 L.Ed.2d 218 (1988)("A party cannot wait to see whether he likes a master's findings before challenging the use of a master."); Hayes v. Foodmaker, Inc., 634 F.2d 802 (5th Cir. 1981); Hill v. Durion Co., 656 F.2d 1208, 1213 (6th Cir. 1981); First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas and Elec. Co., 245 F.2d 613 (8th Cir.), cert. denied, 355 U.S. 871, 78 S.Ct. 122 (1957).

Parties cannot wait to see how a master will rule, then, if displeased, have the master removed at any point. This would promote unchecked forum-shopping for masters and would undermine the special master's role.

There is no conflict among circuits or constitutional issue regarding appointment of, or waiver of objection to, special masters which would justify certiorari. In any case, the Court should not decide constitutional questions (e.g., constitutionality of a special master reference) where the issues can be resolved on other grounds, such as waiver. Youakim v. Miller, supra., 425 U.S. at 236.

Lewis argues at p. 34 of the Petition, that objection to the Special Master could not be waived under Pacemaker Diagnostic Clinic v.

Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984). This is an inexcusable misstatement of law.

Pacemaker dealt with consent by the parties under 28 U.S.C. § 631 et seq. and local Oregon rules to have a federal magistrate try a patent infringement case. The case did not deal with a District Court reference to a special master under Fed. R. Civ. P. 53 and Central District of California local rules. Moreover, Pacemaker stands for the proposition that parties may waive the right to an Article III judge, even for trial:

> A mandatory provision for trial of an unrestricted class of civil cases by a magistrate and not by Article III judges would violate the constitutional rights of the litigants. Nevertheless, as this aspect of the separation of powers doctrine embodied in Article III is personal to the parties, it may be waived.

725 F.2d at 542 (emphasis added).

3. Compensation of Special Master.

Lewis' accusations regarding compensation to Master Carroll are particularly offensive. The record in this case establishes that Mr. Carroll, billed the parties, at a rate of $235 an hour, a total of $23,667.50 (each party to pay one-half). Lewis, based only on ridiculous conjecture, claims that Mr. Carroll has received approximately $750,000 annually[19] (Petition, p. 27), and $10 million over a 13-year period as

---

[19]Interestingly, in Adriana's opening Ninth Circuit brief (see Lewis' Supplemental Appendix, p. 28)., Mr. Carroll's annual compensation was estimated at a mere $420,000. Mr. Carroll's "raise", like the rest of the story, is fantasy.

a Special Master (Petition, p. 32).[20]

Putting aside Lewis' ludicrous imaginings, even if the issue of Special Master compensation was relevant to Lewis, if he had standing to raise it, and if it merited review by this Court, District Courts have broad discretion to set special master fees. Morgan v. Kerrigan, 530 F.2d 401, 427 (1st Cir. 1976). Mr. Carroll's $235 per hour rate was reasonable in view of market rates charged by masters. See Trout v. Ball, 705 F.Supp. 705, 708-709 (D. D.C. 1989).

4. Order Appointing Special Master Not Included in Appendix.

Sup. Ct. R. 14.1.k.(ii) requires

---

[20]Lewis' extraordinary calculations assume Mr. Carroll billing over 3,200 hours per year for about 13 straight years (8.8 hours a day, 365 days a year) at a rate of $235 per hour, working exclusively as a special master for Judge Real.

filing along with a petition for certiorari, an appendix containing any orders rendered in the case by lower courts. Although the District Court entered a written order on March 18, 1987 appointing Special Master Carroll, and Lewis seeks to challenge such appointment, the order is not included in Lewis' Appendix. This is yet another reason to reject Lewis' Special Master arguments.

C. District Court Sanctions and Contempt.

1. Certiorari Not Appropriate.

The Ninth Circuit properly reviewed the District Court's imposition of sanctions under Fed. R. Civ. P. 11 for abuse of discretion. (Opinion, pp. 4-5, citing Cooter & Gell v. Hartmarx Corp., 496 U.S. ____, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990).) The

Ninth Circuit found no abuse of discretion in the District Court's issuance of monetary sanctions in the aggregate amount of $17,197.50 and contempt (Opinion, pp. 34-37).[21] No constitutional issue or conflict among circuits is raised by the Ninth Circuit affirmance; thus, there is no compelling basis, and in fact, no reason at all for this Court to grant certiorari to review the sanctions and contempt orders issued by the District Court.

2. Right to Immediate Review.

At pages 61-63 of the Petition, Lewis argues that he should have had an immediate right to appeal the District Court's sanctions orders, and, to the

---

[21] For review of facts supporting imposition of sanctions by District Court, see Thoeren App., pp. 18-45, 115-124; and Opinion, pp. 30-37.

extent Kordich, supra, precludes such immediate review, it should be overruled.

Shamefully, Lewis neglects to disclose to this Court that, unlike the Appellants in Kordich, the Lewis parties never sought interlocutory appeal of the sanctions. The two interlocutory appeals of sanctions in this case were filed on behalf of Adriana only (see pp. 15-16 infra.).[22] As there is no order denying Lewis the right to an interlocutory appeal, Lewis has no standing to raise the issue and it is not ripe. Lewis' reassertion of this

---

[22]A motion to dismiss Adriana's appeals based on lack of jurisdiction, filed by Thoeren on September 21, 1987, stated (at p. 6): "This Court does not need to determine whether any such congruence of interest exists in this case, because the only notices of appeal filed were by Adriana, not its attorneys." The Ninth Circuit granted the motion on December 21, 1987.

issue defies the most basic rules of standing and merits sanctions.

Additionally, the Lewis parties did not raise the interlocutory appeal issue in their opening Ninth Circuit briefs. The Kordich case is first argued in the reply brief of Amy J. Cassedy and Lewis & Company. The Ninth Circuit was justified in disregarding issues raised for the first time in Lewis' reply brief. This Court should disregard issues not presented or decided in the appellate court. See pp. 34-35 infra.

Finally, there is no legitimate reason for this Court to grant certiorari to consider whether attorneys sanctioned jointly and severally with their clients should have a right of immediate interlocutory appeal. Resolution of this issue is not required to decide this case, and is not

compelled by any pressing constitutional concern or conflict among circuits.

D. Ninth Circuit Sanctions.

The Ninth Circuit sanctioned Lewis under Fed. R. App. P. 38 for filing frivolous briefs (Opinion, p. 37), and under 28 U.S.C. § 1927[23] for violating Fed. R. App. P. 32(a) (briefs filed with 1-1/2 rather than double spacing)[24].

---

[23]28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

[24]Lewis misrepresents that the Ninth Circuit's August 29, 1989 Order (App. XI) "expressly approv[ed] the form and spacing of the opening briefs" (Petition, p. 52). The Court's order said nothing about form and spacing of Lewis' briefs.

1. No Grounds for Certiorari.

Sanctions awards are reviewable under an abuse of discretion standard.[25]

Courts of Appeal have discretion to award sanctions for violations of formatting rules. Hamblen v. County of Los Angeles, 803 F.2d 462, 465 (9th Cir. 1986). Of particular note is Westinghouse Electric Corp. v. N.L.R.B, 809 F.2d 419 (7th Cir. 1987) wherein appellants, whose motion for permission to file a longer brief was denied, circumvented the Court's order by using 1-1/2 rather than double spacing, the effect of which "was to stuff a 70-page brief into 50 pages," were rebuked: "Lawyers must comply with the rules and our orders rather than hope to put one over on the court and to apologize when caught. The penalty for a violation should smart." Id. at 425 fn.

[25]Lewis' Petition does not state a standard of review for sanctions imposed by the Ninth Circuit. In Cooter & Gell v. Hartmarx Corp., supra., 110 L.Ed.2d at 378, 381-382, this Court adopted an across-the-board abuse of discretion standard for sanctions, implicitly overruling the Ninth Circuit's two-tiered standard of review. See, e.g., Zaldivar v. Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986); U.S. v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342, 1345 (9th Cir. 1985); Lone Ranger Television, Inc. v. Program Radio Corp.,

As this Court recently noted in Cooter & Gell v. Hartmarx, supra., 110 L.Ed.2d at 383-384, appellants who challenge sanctions when they have "no reasonable prospect of meeting the difficult standard of abuse of discretion" may justifiably be sanctioned under Fed. R. App. P. 38.

If appeals of sanctions from a District Court to a Court of Appeals are frivolous where no reasonable prospect exists for meeting the abuse of discretion standard, a priori, attempted challenge of a Court of Appeals' exercise of discretion by means of certiorari, especially where no colorable issues meriting review under Sup. Ct. R. 10 are presented, is utterly

---

740 F.2d 718, 727 (9th Cir. 1984). The Ninth Circuit acknowledged the controlling authority of Cooter & Gell at pp. 4-5 of the Opinion.

frivolous.

2. No Abuse of Discretion.

Assuming arguendo a basis for certiorari, a Court of Appeals may sanction parties and attorneys under: (1) its inherent authority; (2) Fed. R. App. P. 38; and/or (3) 28 U.S.C. § 1927.[26] Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); Hamblen v. County of Los Angeles, supra., 803 F.2d at 465; Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133, 1137-1138 (9th Cir. 1984).

The Ninth Circuit acted well within its discretion in awarding attorneys'

---

[26]Immediately following and in response to Roadway Express, supra., 28 U.S.C. § 1927 was amended to include attorneys' fees.

fees and costs.[27] Even Adriana's

---

[27]Case law is in accord: Kapco Mfg. Co. v. C & O Enterprises, Inc., supra., 886 F.2d at 1491-1497; Glanzman v. Uniroyal, Inc., 892 F.2d 58, 61 (9th Cir. 1989)(claims not founded on fact or law); Julien v. Zeringue, 864 F.2d 1572, 1575-76 (D.C. Cir. 1989); Westinghouse Electric Corp. v. N.L.R.B., supra., 809 F.2d at 424-425; Braley v. Campell, 832 F.2d 1504, 1508-1516 (10th Cir. 1987); Hamblen v. County of Los Angeles, supra., 803 F.2d at 464-465 (violation of format requirements; "irresponsibly frivolous" brief); Shearson Loeb Rhoades, Inc. v. Quinard, 751 F.2d 1102, 1103 (9th Cir. 1985)(appeal of default judgment "wholly without merit"); Mone v. Comm'r, supra., 774 F.2d at 574-575; Malhiot v. Southern California Retail Clerks Union, supra., 735 F.2d at 1137-1138 (appeal wholly without merit; briefs misrepresent record and California law); Herzfeld & Stern v. Blair, 769 F.2d 645, 647 (10th Cir. 1985); Limerick v. Greenwald, supra., 749 F.2d at 101-102; Lone Ranger Television, Inc.v. Program Radio Corp., supra., 740 F.2d at 726-727; McDonnell v. Critchlow, 661 F.2d 116, 118-119 (9th Cir. 1981)(appeal meritless as to certain appellees); Wood v. McEwen, 644 F.2d 797, 802 (9th Cir. 1981)(spurious, unsubstantiated allegations of misconduct against various individuals and organizations); Lipsig v. Nat'l Student Marketing Corp., 663 F.2d 178, 180-182 (D.C. Cir. 1980); Libby, McNeill and Libby v. City National Bank, supra.,

replacement counsel, Greenberg Glusker, acknowledged that its clients' opening briefs, prepared by Lewis, were replete with frivolous, irrelevant arguments (see October 11, 1989 entry in chronology, p. 20 infra.).

3. Sanctions Proper Under 28 U.S.C. § 1927.

Lewis argues that sanctions were not proper under 28 U.S.C. § 1927 because the Ninth Circuit did not make findings of "intent, recklessness or bad faith" (Petition, pp. 52-53). This argument does not speak to the sanctions awarded pursuant to Fed. R. App. P. 38. In Roadway Express, Inc. v. Piper, supra., 447 U.S. at 767, this Court wrote that, when imposing attorneys' fees and costs under their inherent

---

592 F.2d at 511 (no standing to appeal issues relating only to coparties).

powers, courts should provide fair notice, an opportunity for a hearing, and a finding of attorney conduct constituting or tantamount to bad faith. While the Court did not specify these procedures to be applicable to imposition of sanctions under 28 U.S.C. § 1927, such procedures were in any event satisfied in this case.[28]

Lewis was put on notice of possible sanctions by the request for attorneys'

---

[28] See Julien v. Zeringue, supra., 864 F.2d 1575-1576, citing Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)(due process satisfied where counsel had notice and opportunity to respond to request for sanctions); Braley v. Campbell, supra., 832 F.2d at 1514-1515 ("[T]he panel's extensive discussion of the appeal's lack of merit and of the defects in Alexander's briefing of the appeal constituted sufficient findings and conclusions. . . . At the appellate level, the right to respond does not require an adversarial, evidentiary hearing."); Malhiot v. Southern California Retail Clerks Union, supra., 735 F.2d at 1138.

fees and costs in Thoeren's Ninth Circuit opening brief (Thoeren App., p. 2). The Lewis parties had an opportunity to respond in their reply briefs, again at oral argument, and finally by filing a response to the award of fees and costs, which Lewis did not file. The Opinion contains sufficient findings to support the sanctions awarded. See Opinion, pp. 37-38. In sum, no issue justifying certiorari is presented.

E. Petition for Rehearing and Rehearing En Banc.

The Lewis parties argue, without presenting any supporting authority, that the Ninth Circuit improperly denied their petition for rehearing and suggestion for rehearing en banc as untimely (Petition, pp. 20-21). The findings stated in the Ninth Circuit's

order denying the petition for rehearing (Lewis App. X) are proper and not clearly erroneous. No issue is presented which justifies a grant of certiorari.

F. "False testimony, sham issues and sham pleadings."[29]

Lewis' argument that the Ninth Circuit erred by granting Adriana's motion to replace Lewis as its counsel in view of Lewis' purported attempt to disclose "sham testimony, sham issues and sham pleadings" is the greatest sham, and shame, of all. Lewis advanced the argument relentlessly and futilely in the Ninth Circuit in opposing Greenberg Clusker's motion to substitute as counsel of record for Adriana, and on

---

[29]Petition, pp. 42-47.

appeal.[30] Reassertion of this argument before this Court is beyond frivolous.[31]

In addition to Lewis' argument being based on factual fabrication, it lacks any legal merit. As Greenberg Glusker pointed out in their Ninth Circuit pleadings submitted in support of their motion to substitute in as Adriana's counsel, applicable law unequivocally grants a client the absolute right to discharge an attorney

---

[30]The Ninth Circuit considered and rejected Lewis' arguments, as presented in Lewis' many Briefs on the subject. See Opinion, p. 32 n. 11.

[31]As Adriana's replacement counsel, Greenberg Glusker presumably was in a position to evaluate the validity of Adriana's testimony, issues, and pleadings, as well as Lewis' accusations. Greenberg Glusker categorically condemned Lewis' contentions. See chronology entries for October 11, 1989, November 28, 1989, February 13, 1990, and May 2, 1990 (pp. 20, 21-22, 23, and 25, respectively).

at any time for any reason.[32]

Though the matter is irrelevant to Lewis' Petition, and not necessary for its disposition, Lewis seeks to have this Court hold that the Sixth Amendment of the United States Constitution precludes dismissal of counsel in private civil actions where counsel has threatened disclosure of alleged client falsehoods. As in the proceedings below, Lewis presents no persuasive authority for this obnoxious proposition. The two cases cited at p. 43 of the Petition, McCoy v. Court of

---

[32] Federal Sav. & Loan Ins. v. Angell, Holmes & Lea, 838 F.2d 395, 395-396 (9th Cir. 1988)(the law of California "holds that a client's power to discharge an attorney, with or without cause, 'is absolute.'"); Kashefi-Zihagh v. I.N.S., 791 F.2d 708, 711 (9th Cir. 1986)("A party may terminate his counsel's representation at any time."); Fracasse v. Brent, 6 Cal.3d 784, 790, 100 Cal.Rptr. 385, 494 P.2d 9 (1972).

App. of Wisconsin, 486 U.S. 429, 100 L.Ed.2d 440, 108 S.Ct. 1895 (1988) and Nix v. Emanuel Charles Whiteside, 475 U.S. 157, 89 L.Ed.2d 123, 106 S.Ct. 988 (1986), are patently inapposite. First, the cases address criminal defendants' Sixth Amendment rights to counsel, not at issue in this civil case; and second, they do not support the proposition that a client who intends to perjure himself somehow forfeits the right to change counsel.

Even if there was any validity to Lewis' claims, Lewis' remedy was to make a motion to withdraw as counsel.[33] Instead Lewis violated his ethical

---

[33] McCoy v. Court of App. of Wisconsin, supra., 486 U.S. at 436 ("An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal."); Nix v. Whiteside, supra., 475 U.S. at 174.

obligations and sought to injure his clients by refusing to withdraw.

As with the rest of Lewis' petition, no remotely colorable issue meriting certiorari is presented.

VII. CONCLUSION

Mercifully, this is Lewis' Court of last resort.

Thoeren respectfully requests that the Petition be denied, and the Motion for Attorneys' Fees and Double Costs, brought concurrently by Thoeren, be granted.[34]

---

[34]In the event of such an award, at the Court's invitation, Thoeren will submit a pleading itemizing attorneys' fees and costs.

Dated: January 10, 1991.

Respectfully submitted,

MICHAEL K. ZWEIG
SACKS & ZWEIG

Counsel of Record
for Respondents
Konstantin Thoeren,
Patrola Films, Inc.,
and Patrola, G.m.b.H.

Of Counsel:
BRUCE IAN FAVISH